

# PROVIDING A SENSE OF JUSTICE

## Informal mechanisms for dealing with domestic violence

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Informal justice structures are used by many women for dealing with domestic violence. Their services more closely meet the needs of women than the criminal justice system, in terms of the immediacy with which they resolve problems, their focus on mediation and resolution rather than arrest and punishment, and their affordability. For resolving domestic conflicts, alternative justice mechanisms seem to have much more legitimacy for those involved than the formal justice process.

Over the past decade, talk of 'access to justice' has become commonplace in South Africa, and informal justice mechanisms are often hailed as the method by which this can be achieved. Research has shown that throughout Southern Africa women choose alternative justice mechanisms to address violence both in their homes and their communities.<sup>1</sup> Street committees, non-governmental organisations (NGOs) and community policing organisations are often used to mediate and resolve domestic disputes.

Many turn to non-state mechanisms because of the emotional and financial costs of seeking state assistance, the risk of secondary victimisation at the hands of criminal justice practitioners, and questions about the legitimacy of the state system. Many women are also dissatisfied with the outcomes of formal legal remedies because they fail to provide a sense of justice.

### Background to the study

Little attention has been paid to the issue of gender in relation to informal justice mechanisms in South

Africa. As a result, an exploratory research project on the role of alternative mechanisms in addressing domestic violence was developed. It aimed to evaluate the services provided, and consider whether informal approaches can improve access to justice for the majority of women.

Informal justice mechanisms were defined as those that operate outside the formal state criminal justice system, are rule generating, and work to provide justice within a community. They were defined as 'informal' in terms of their role in justice delivery rather than according to the way in which the organisations were constituted. Other problem-solving mechanisms such as social services, non-governmental organisations, clinic sisters and the like were also included.

A total of 26 interviews were undertaken between April and August 2003 in Khayelitsha, Thohoyandou and Mount Frere. The research was done in three phases, and entailed both observation and interviews. This article presents selected findings from the project.

### **Where do women take their cases?**

Sources of assistance vary considerably. Complainants seeking mediation or reconciliation may access informal justice systems, whereas those wishing to punish their abusers may be more inclined to use the courts. Even within the context of a single problem, such as domestic violence, women use a range of different structures depending on the kind of violence they have suffered, and their relationship with the perpetrator. Power relations within their community and economic dependence on their husbands also influence their choice.

For many women, the family often remains the first (and sometimes only) source of assistance in attempting to resolve domestic abuse, failing which they use other structures such as the church, street committees, headmen, traditional healers and NGOs. The court system is seen as a last resort when all other options have been exhausted.

Like other African countries, the lack of financial resources is a major factor in women's ability or inability to access formal criminal justice structures. Where distances are considerable many women cannot use the court system due to a lack of transportation, money and the time involved. Furthermore, almost every interviewee in the study pointed out that unemployed women avoid the formal system because of the possibility that their partner (and abuser) would be arrested, leaving no one to provide for the family. This financial dependency forces women to seek a more conciliatory process to ensure they are not left destitute.

### **Nature of cases brought to informal structures**

All the organisations studied deal with domestic violence cases; in fact these comprised between 50% and 90% of their caseloads. Most interviewees said that these cases often include other issues, particularly financial support and maintenance. In a single incident, a woman may be beaten because her husband was drunk, because they argued about money, because she didn't want to cook for him, because she asked him where he had been, and because she had refused him sex. Confronting her husband about neglecting his obligations, children

or home leads to conflict that may culminate in physical violence.

Arguments over money were cited as triggering abuse, with most interviewees explaining that incidents usually begin when the female partner requests money to support herself and the children. Maintenance orders were seen as a 'tool' used for abuse when the parties are still living in the same house: male partners use these orders to not only shirk parental responsibility, but also as a way of punishing the woman for having sought the order in the first instance.

State grants (such as pensions, child and disability grants) are often the only source of much-needed income in a household. However, these grants were mentioned over and over as a source of conflict. In the context of large-scale unemployment, it was reported that male partners consider the grant money provided as theirs. A woman's eligibility for these grants appears to make her vulnerable to violence. This is not only true when women are targeted after leaving the pay point, but also within their own homes when husbands and children demand access to the money (often violently).

Domestic violence perpetrated in the context of state grants was described as pervasive. Many interviewees said that a large amount of elder abuse results from state grants, as violence is often used against older people by younger family members in order to steal their pensions. One interviewee called this the 'pension grant generation' for whom this behaviour has become acceptable.

Interviewees reported that their organisations also deal with cases of emotional abuse, although they believed these incidents can be traced to problems of financial abuse. Sexual abuse was very seldom mentioned, although the sexual abuse of children was mentioned particularly in the rural areas. Interviewees seemed aware that women are less likely to report allegations of sexual abuse and most did not deal with these cases at all, choosing rather to assist complainants in reporting to the police.

### **Resolving cases through reconciliation**

Many women who apply for a protection order are disappointed in the type of intervention that the

police provide. For many, their expectation is far removed from the actual events their visit puts into motion – particularly when this results in the perpetrator's arrest. Women in domestic violence disputes often simply want the violence to stop. Many don't want the abuser locked up or directly punished. The interview data shows that many women seek reconciliation as a form of justice, even when the facts of the case would indicate that a more punitive solution, and the involvement of the courts and police, are warranted.

#### *Mediation rather than punishment*

Many informal justice mechanisms adopt the conflict resolution approach because it is more in line with the complainant's wishes. In the short term it creates a space for communication in which both sides will be heard – a key factor for ensuring a sense of justice. Importantly, too, it represents an opportunity to be heard, and to share the problem whether or not resolution is achieved, or even sought, thereafter.

Almost all interviewees stated that the aim of their intervention was reconciliation and peace. Unless there were signs of physical violence when the incident was reported, they only recommended or provided counselling. When physical violence was evident, complainants were advised to go to the police (and were sometimes accompanied), report the incident and open a case against the abuser. Only one interviewee seemed aware of the dangers of favouring mediation over obtaining a protection order, although she still supported counselling as the appropriate intervention. Her organisation's approach was to advise the client to do both in order to curb the abusive behaviour.

The process followed by the various organisations for dealing with domestic violence was similar. Most adopted classic mediation-style procedures: first hearing the complaint, calling the parties together, hearing both sides of the story and then mediating a resolution. Almost always, the resolutions called for some degree of behaviour modification on the part of both the complainant and the respondent.

Only one organisation reported conducting 'investigations' into the allegations brought by the

complainant. It is, however, worth noting that this organisation styles itself as a pseudo police force with many of its members being self-confessed former freedom fighters.<sup>2</sup> Once their 'investigation' is complete, the organisation takes the offenders to the SAPS.

When dealing with domestic violence, a clear distinction was made between civil and criminal matters, with many organisations avoiding the latter. For most, including many of the chiefs, serious assault and sexual abuse cases are sent directly to the police. In many instances, the informal service providers accompany the complainant to the police station, assist her to open a case, and even act as 'court volunteers' throughout the criminal justice process. Without suitable training, the value of this assistance may be questionable. But many women believed that having someone reasonably knowledgeable about the police and court processes was enormously valuable.

#### *Infrequent use of force or punishment*

Interviewees reported that almost all abusers accepted the invitation to attend a meeting. This is believed to work because of the close social networks that exist in townships and rural areas. Very few said they had to 'force' an abuser to attend, and for most, using 'heavy' tactics simply meant that a member of the organisation fetches the abuser from his house. Of course, the exact nature of 'fetching an abuser' remains unknown, and two organisations admitted to having a reputation for sometimes using violence.

For most organisations though, reminding abusers that they were attempting to help, particularly as an alternative to the ('less appropriate') criminal justice system, was enough to convince the abuser to attend.

#### *Securing the participation of all parties*

Some interviewees said it was difficult to get people to open up during the mediation process because of shyness and embarrassment, the power relations within the relationship, or perceived community pressures. Most interviewees seemed sensitive to these dynamics, yet they still advocated hearing

'both sides of the story' with both parties present, and in a public forum with members of the community in attendance.

When this dynamic becomes a problem, community members are cleared from the meeting, and proceedings resume with just the parties and the mediator present. This was particularly significant in the rural setting, where the entire village attends cases. Some headmen reported hearing domestic violence matters *in camera* although the benefits of doing this are somewhat diluted once it becomes known that domestic violence cases are heard on a particular day.

Interviewees seemed well aware of the reluctance of male respondents to speak truthfully about domestic problems (and by extension, their culpability) and said that it simply takes time, and discussion, before the true nature of the problem surfaces. Resolution can then ensue:

*So, they normally come to us, we'll begin to say 'Lie and lie and lie to us until you get to the truth.' And we find that the truth surfaces, that then you begin to say, now that it has surfaced, let us agree that we are going to discuss. And we begin to sit now and talk through it. [N1]*

In some cases offenders were reported to be impossible to work with – particularly when the mediator was a woman. These cases are postponed until a male mediator is able to talk to the respondent 'man-to-man'. The exact nature of these discussions is vague, but seems to include little condemnation of the abusive behaviour. One interviewee advises abusers about ways to continue these culturally-sanctioned male behaviours (such as having other girlfriends) while at the same time not 'rocking the boat' with his wife. He even seemed happy to be included in the lie in order to settle the situation:

*Then I talk to him man-to-man. Say to him, look, I know you have a girlfriend ... I mean that's nothing bad. But don't behave like this to your wife. I mean, we are all men ... we are doing this thing. Just maintain as if you*

*were drunk, and then you can call any man ... you can call me – your wife doesn't know me – say I was with [male member's name] and we were ... drunk. Simple as that. [S2]*

### **Time, place and money**

All the informal justice mechanisms that were studied were located within the community they serve, and their personnel were community residents. Only one structure reported having office hours (08h00–18h00) while all others see cases after hours to accommodate employed people.

Cases were attended to within one day, or immediately if necessary.<sup>3</sup> The swift nature of the process reflects women's needs, and might range from immediate payment of outstanding maintenance (as opposed to the much longer formal maintenance court process) to other mediation-style interventions. Interviewees reported that complainants want immediate action rather than referrals or long term solutions. According to some, this does not always serve the satisfactory delivery of justice, as effective deliberation may be compromised. Interviewees nevertheless underlined that their ability to resolve a case quicker than the criminal justice system is desirable to their 'clients'.

Most of the organisations studied do not charge for their assistance, even though many are not formally funded.<sup>4</sup> The exception was one organisation that was described as charging (often heavily) for its services. Representatives described these fees as 'donations' given willingly in return for the assistance rendered. Although the organisation declined to reveal its prices, denying that they were high, a poster on the wall indicated fees ranging from R220 to R290 according to area.

### **Links with state structures**

Surprisingly, there was far less separation between the state and informal justice mechanisms than expected. All structures reported a close working relationship with the criminal justice system, fostered largely by the community police forums. While interviewees said they refer cases to the state system, researchers detected that women were subtly coerced to use informal mechanisms instead. However, most made it clear to women that they

could use the formal system, or both systems simultaneously.

Frequent references were made to referrals back to informal mechanisms from the police or courts. Interviewees reported that in some instances police refuse to open cases until there is evidence that the complainant has attempted to resolve the problem through an informal justice mechanism. The view was frequently expressed that police simply do not want to deal with domestic violence incidents:

*The police, each and every case you'll find out that they are sending it down to the clerk [who does mediations] here saying she must handle it. "We don't want it" [the police say]. There are still elements in the police station who don't want to involve them in the domestic violence cases. [T1]*

Many respondents saw their organisations as part of a broader criminal justice system in which informal and formal structures work together. They felt that handling domestic violence cases both protects complainants from bad police attitudes, and eases the police's caseload. Interviewees also said that women are reluctant to report to the police because severe resource shortages mean that service is poor. Interestingly this would suggest that women believe the informal mechanisms (which are poorer than the formal ones) can deliver justice, their resources notwithstanding.

Interviewees often pointed to the myriad of problems with the criminal justice system's approach to domestic violence cases. Many of these criticisms relate to the police's inability and unwillingness to deal with these cases satisfactorily. The lack of urgency exhibited by police, even when physical abuse is evident, was cited as the main problem. Interviewees mentioned police corruption as another key reason that complainants decided not to report. Furthermore, the unwillingness of police to serve protection orders means that many complainants either do not access the formal system, or choose to discard the order.

Criticisms aside, almost every interviewee reported having some cases that were simply too difficult to

deal with, and there was a distinct reliance on the criminal justice system as a 'last resort'. The police (with their handcuffs and police vans) were viewed as the undisputed authority in terms of their ability to arrest people for infractions.

### **What informal mechanisms offer**

Informal mechanisms may alleviate some of the immediate problems that women face: they are founded and run in and by the community, meetings take place near the complainant's residence, and there are no monetary costs associated with travel and the services rendered. They operate at all hours, and can attend to cases as they are reported. There are no language barriers and proceedings are familiar in procedure and resolution which means they are recognised as legitimate. The structures also see domestic violence cases as important.

Their approach seems aligned with the complainant's wishes: it creates an opportunity to be heard, and to share the problem whether or not resolution is achieved, or indeed sought. In this sense, informal systems have a greater potential to alleviate violence than a protection order. At the most basic level, informal mechanisms provide the opportunity for women to access justice for cases that may otherwise go unreported.

This is not to say that informal justice mechanisms are without problems. Their resolutions are not always relevant nor do they address the long term issues and patterns of violence. As with the formal system, it is questionable whether informal structures can prevent violence against women. At times, the difference between the formal and informal systems' treatment of women is little more than a matter of degree. However, they do provide an opportunity for conflict resolution based on restoration, and are particularly appropriate for people living and working closely in the same community.

A unique opportunity exists for engaging with these structures. The assertion that "the fact that community-based justice forums are unregulated and predominantly controlled by men within communities [is] a sound enough reason not to

enter the debate about informal mechanisms as an option for victims of gender-based violence"<sup>5</sup> is simply no longer plausible.

However, access to justice for women should not be tied to either formal or informal legal systems. Both approaches need to be strengthened. Training, increased resources and capacity building within the alternative structures can ensure that societal attitudes to women and abuse are challenged. Regulation can ensure that organisations apply standards that uphold the law and provide appropriate solutions. At the same time, organisations providing legal aid, paralegal services and legal education programmes both in schools and in communities need to be strengthened.

### Acknowledgement

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### Endnotes

- 1 See for example, Women and Law in Southern Africa Research Trust, *Charting the Maze: Women in Pursuit of Justice in Swaziland*, WLSA, Mbabane, Swaziland, 2000; Women and Law in Southern Africa Research Trust, *In Search of Justice: Women and the Administration of Justice in Malawi*, Dzuka Publishing Company Limited, Blantyre, Malawi, 2000; Women and Law in Southern Africa Research Trust, *The Justice Delivery System and the Illusion of Transparency*, Women in Law in Southern Africa Research Trust, Maputo, Mozambique, 2000; A Armstrong, *Culture and Choice: Lessons from Survivors of Gender Violence in Zimbabwe*, Violence Against Women in Zimbabwe Research Project, Harare, Zimbabwe, 2000; M Bbuku-Chuulu, P Mulenga Chileshe, H Ntalasha, S Kasonde-Ng'andu, M Mukelabai Daura and A Chanda, *Gender Violence, The Invisible Struggle: Responses to the Justice Delivery System in Zambia*, Women and Law in Southern Africa Trust, Lusaka, Zambia, 2001; M Bbuku-Chuulu, P Mulenga Chileshe, H Ntalasha & A Chanda, *Justice in Zambia: Myth or Reality? Women and the Administration of Justice*, Women in Law in Southern Africa Trust, Lusaka, Zambia, 1999; L Artz, *Violence against Women in Rural Southern Cape: Exploring Access to Justice within a Feminist Jurisprudence Framework*, unpublished MA (Criminology) Dissertation University of Cape Town, Cape Town, 1999.

- 2 Personal communication with the secretary-general and senior director of detectives 05/06/2003.
- 3 This may not mean that the case has been completed, but rather that the complainant has been heard, and the respondent called for mediation. Many of these organisations are open from very early until late allowing for large numbers of complainants to be served. Many also had large numbers of volunteer mediators who are not only available, but often patrolling in the community as part of crime prevention activities, and are able to hear problems as they are discovered.
- 4 Traditional leaders are the exception, in that they form part of local government. The funding arrangements of organisations was not investigated, although information was often gleaned in answer to other questions. Most organisations studied operated with a great scarcity of resources and few paid their staff. Some organisations were not funded at all, relying on donations such as paper and operating supplies from concerned individuals.
- 5 L Artz, op cit.